

December 29, 2006

Corbin Davis
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RE: ADM File No. 2005-41

Dear Clerk Davis:

Pursuant to action of the State Bar's Representative Assembly on April 16, 2005, the State Bar supports adoption of ADM File No. 2005-41, a proposed new Rule 19 to the Rules Concerning the State Bar of Michigan to clarify that aspects of certain State Bar of Michigan programs and work product are confidential in nature and that the identity of bar members or the public utilizing these programs and the nature of the services rendered to them, cannot be made public except by court order after notice and hearing.

The new rule would clearly indicate that, except as provided in Michigan Rules of Professional Conduct (Rules) 8.3(c), the confidentiality provision would not abrogate an attorney's independent obligation under the Rules to report "a significant violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer." Historically, a limited number of State Bar of Michigan programs have operated on a confidential basis. State Bar programs claiming confidential operations are the Ethics Hotline, the Ethics Committee, the Unauthorized Practice of Law Program (UPL), the Client Protection Fund, the Lawyers and Judges Assistance Program, and the new Practice Management Resource Center. The State Bar has successfully asserted a confidentiality policy when faced with demands from third parties for certain information, but there is currently no specific written authority backing up the confidentiality policy.

In the process of developing the new law office management program for Michigan, the State Bar learned that the at least twenty other states have this type of program and that all those recognized as benchmark programs offer confidentiality protection to program users. A grant of limited confidentiality encourages members to contact the bar seeking guidance and advice regarding remedying situations and modifying behavior to avoid future issues.

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Providing members with resources to which they can turn to when struggling with critical practice issues or drug or alcohol dependency, strengthens the integrity and quality of the profession and service to the public, and it is our experience, and the experience of other states, that confidentiality provisions increase the usage and usefulness of member assistance programs.

Confidentiality provisions also assist the public in the State Bar's UPL and Client Protection Fund programs by encouraging the public to come forward when victimized by individuals practicing law, either authorized or unauthorized. If complaints from the public were subject to discovery by subpoena, the public would be chilled from coming forward to report misconduct out of fear of retribution. This is an acute concern in the unauthorized practice of law area. It is our experience, for example, that an alleged victim of UPL who lives in a small town and will necessarily interact with the alleged perpetrator may not want the perpetrator to be aware a complaint was filed with the SBM. There have been occasions when a UPL perpetrator, not bound by attorney-client privilege, threatens to disclose to the detriment of the victim what was intended by, and represented to, the victim as confidential information. The SBM often receives requests from the alleged perpetrator for the identity of the complainant and historically the SBM has refused to disclose this information. If and when legal action is taken against an alleged UPL perpetrator, due process ensures that the alleged perpetrator's right to confront his or accuser is honored. At the stage of State Bar investigation, however, having a confidentiality provision is an important tool of public protection.

We appreciate the opportunity to offer these recommendations for the Court's consideration. Please contact me with any further questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Janet K. Welch". The signature is fluid and cursive, with the first name "Janet" being more prominent and the last name "Welch" following in a similar style.

Janet K. Welch
Interim Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Ed Haroutunian, Chair, Representative Assembly
Kimberly M. Cahill, President